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SUPREME COURT OF THE UNITED STATES.

October Term, 1898.

Filed April 15, 1899.

GILMORE G. SCRANTON,
Plaintiff in Error,

vs.

EBEN S. WHEELER,
Defendant in Error.

No. 262.

In Error to the Supreme Court of Michigan.

Supplemental Brief for Plaintiff in Error.

JOHN C. DONNELLY,
Counsel for Plaintiff in Error.

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A statement of the facts and of the errors assigned will be found in the principal brief filed by the plaintiff in error. It is proposed to discuss herein one or two aspects of the case not therein touched upon.

ARGUMENT.

I.

The rights of a riparian owner in a navigable stream bordering upon his land may be classified as follows:

(1) Those rights which he has in the submerged soil abutting his upland;

(2) Those rights which he has in the navigation of the stream when traveling upon it; and

(3) Those rights which belong to him (or more properly, to the riparian land which he owns), to reach navigable water from his land and *vice versa*.

These rights differ in their origin and in the method of, and the limitations placed upon, their enjoyment. A clear

apprehension of these distinctions is necessary to an understanding of our position in the present case.

As to the rights included within the first class, it is important to note the following:

In the State of Michigan the owner of riparian property owns the submerged soil to the center of the stream. If this does not come to him by express grant, it devolves upon him by operation of law. The title which he thus acquires in the bed of the stream is subject to this important qualification: it is subservient to the paramount right of Congress to occupy the land for the purpose of regulating commerce and navigation. Congress can, in its discretion, appropriate the bed of the stream for that purpose without making compensation to the riparian owner. This is not a "taking" of his property requiring compensation, because for this purpose the property is not his.

As to the rights falling within the second class, the following is to be noted:

These rights inhere in the owner of the bank as an individual member of the public. The right to navigate the stream after he is once upon it, is a public right, *jus publicum*. Every member of society enjoys the privilege of participating in this right, in the same manner and to the same extent as every other member. The enjoyment of this privilege is independent of the ownership of riparian property or the soil over which the stream flows; and is neither greater nor less by virtue of such ownership. Being a right belonging to all the members of society, any injury to that right is an injury which one member sustains in common with all others, and being an injury to a public right, it cannot be redressed by private action. When an obstruction is placed in a navigable stream, such as a pier, a bridge or a lighthouse, adjacent riparian owners may be seriously inconvenienced and

suffer great loss from the fact that the obstruction, although improving the navigability of the stream generally, interferes with their particular method of using it. One owner may find that after he is upon the stream he must pursue a longer or more hazardous route, and he may therefore suffer in a greater degree than his neighbor. But, as pointed out before, the right to pass and repass upon the stream after reaching it, is a public right, and compensation cannot be had by private parties for any injury affecting it.

Of the rights embraced within the third class, the particular right which concerns us, is the right of access to the navigable water from riparian property, and *vice versa*.

As to this right it should be noted:

1. It is a private as distinguished from a public right.

2. It belongs to the owner of the upland by virtue of such ownership.

3. It exists independent of whether the riparian owner also owns the submerged land;

4. It is entirely distinct from the public right of navigation or from the right of any individual to participate in that public right.

It is this latter right alone which, if our position is correct, cannot be destroyed without compensation first being paid to the owner.

While Congress can undoubtedly authorize the occupation of the submerged land and can place obstructions in the stream, interfering with some methods of enjoying the public right of navigation without the payment of compensation, it has been nowhere claimed, so far as I am aware, that the upland itself can be thus appropriated for that purpose. This being granted, it follows that if the right of access is a part of the upland, and is in law a valuable right, no more can it be appropriated without

compensation. This is the conclusion arrived at by Mr. Gould in his work on "Waters," § 151, 2d Ed.

"When it is conceded that riparian rights are property, the question as to the right to take them away without compensation would appear to be at an end."

This right of access is a private right and "an interruption of it is an encroachment upon a private right, whether caused by a public nuisance or authorized by the Legislature."[1]

The right to pass from one's land onto the water and *vice versa* is something quite different from the right to pass up and down the stream after getting upon it. The distinction has been clearly recognized in the English cases. It was stated in one of these cases as follows:

"Now, I apprehend that the right of the owner of a private wharf, or of a roadside property, to have access thereto, is a totally different right from the public right of passing and repassing along the highway or the river."[2]

In these English cases, a number of which are discussed at some length in our principal brief, it has been pointed out with great force that this private right of access cannot be destroyed without compensation; that it would be absurd to say that a private right is not infringed when a man who has been accustomed to enter his property from a highway finds his entrance made impassable; that the right to step from one's land onto a highway and *vice versa* is a right distinct from and in addition to the right to pass and repass along the highway.[3]

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(1) Gould on Waters, 2d Ed., Par. 149, p. 304.

(2) Atty. Gen. vs. Conservators of the river Thames. 1 Hemming & Miller. 1.

(3) Lyon vs. Fishmongers Co., 1 App. Cas., 662.
Rose vs. Groves, 5 M. & G., 613.
Duke of Buccleugh vs. Board of Pub. Works, L. R., 5, H. L. 418.
Met. Board of Works vs. McArthur, 7 H. L. Law Rep., 243.
Caledonia Ry. Co. vs. Ogilvy, 2d Macq. Sc. App., 229.
Montreal vs. Drummond, 1 App. Cas., 384.
Bell vs. Quebec App. Cas., 8497, 2 L. R., 305.

The distinction is between the right of access from one's land to the highway and the power to complain of an obstruction to his progress in the highway after he gets upon it. The latter affects his enjoyment of a public right, while the former is a private right, incident to the upland and constituting a part thereof. When he is once upon the highway he is a traveler like the rest of the public, and any injury suffered affects him in common with all others similarly situated.[4]

This Court has said that this riparian right of access is a valuable property right and cannot be capriciously destroyed or abridged; a right which, when once vested, cannot be taken from the owner except in accordance with established law, and upon payment of due compensation.[5]

We have discussed in our former brief some of the cases which, it seems to us, recognize clearly that the right of access is a form of the enjoyment of the upland and that it constitutes a part of the land itself.

Property need not be taken in the literal sense in order to entitle the owner to compensation.

Any serious interruption in the common and necessary use of the property may be such a taking as will entitle the owner to compensation.[6]

The riparian proprietor has the right to make a landing wharf or pier for his own use or for the use of the public, subject to such general rules and regulations as the Legislature may see proper to impose for the protection of the rights of the public.[7]

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(4) Gould on Waters, Par. 124, 148 et seq., p. 245.

(5) Yates vs. Milwaukee, 10 Wall., 497, and cases cited on page 19 of our principal brief.

(6) Pumpelly vs. Green Bay, etc., Co., 13 Wall., 166.
Crocker vs. N. Y., 15 Fed. Rep., 405.
Cooley's Const. Lim., 6th Ed., p. 670, and note 3.

(7) Dutton vs. Strong, 66 U. S., 1 Black, 25 (17 L., ed. 29); St Paul & P. R. Co. vs. Schurmeier, 74 U. S., 7 Wall., 272 (19 L., ed. 74); Atlee vs. Northwestern U. Packet Co., 88 U. S., 21 Wall., 389 (22 L., ed. 619); Gould on Waters, 278.

The owner can be deprived of his right of access only in accordance with established law; and, if necessary that it be taken for public use, upon due compensation.[8]

This does not include the right to redress for an obstruction not against the front of the plaintiff's land, even when it entirely closes the highway.[9]

II.

The power of Congress to regulate navigable waters under the commerce clause of the Constitution was the subject of discussion in South Carolina vs. Georgia, 93 U. S., 4, and Gilman vs. Philadelphia, 3 Wall., 724. It was said in those cases that the power vested in Congress by the Constitution was the same power which the States possessed before the adoption of that instrument, and which was possessed by the English Parliament before the Revolution. During the colonial period the English Parliament exercised complete control over navigable waters, and in the exercise of this power might take private property without compensation. The colonies, after the separation, succeeded to whatever powers Parlia-

(8) Weber vs. State Harbor Comrs., 85 U. S., 18 Wall., 57 (21 L. ed. 798); Atlee vs. Northwestern U. Packet Co., 88 U. S., 21 Wall., 389 (22 L. ed. 619); Richardson vs. Boston, 65 U. S., 24 How., 188 (16 L. ed. 625); Baltimore & O. R. Co. vs. Chase, 43 Md., 23; Harrison vs. Sterrett, 4 Har. & McH., 540; Diedrich vs. Northwestern Union Co., 42 Wis., 248; Delaplaine vs. Chicago & N. W. R. Co., Id., 214; Meyers vs. St. Louis, 8 Mo. App., 266; Barron vs. Baltimore, 32 U. S., 7 Pet., 243 (8 L. ed. 672); Clark vs. Peckham, 10 R. I., 35, 9 R. I., 455; Morrill vs. St. Anthony Falls Water Power Co., 26 Minn., 222; Norfolk vs. Cooke, 27 Gratt., 430, 435.

(9) Baily vs. Phila., W. & B. R. Co., 4 Harr. (Del.), 389; Boston & W. R. Corp. vs. Old Colony R. Corp., 12 Cush., 605.

ment had possessed; and upon the formation of the Federal Government, Congress succeeded to whatever powers the States had possessed, subject, however, to this important qualification: That in the exercise of the powers delegated to it (and included herein the power granted by the commerce clause), Congress is subject to whatever limitations are created by other parts of the same instrument. In extending its control to navigable waters, therefore, Congres, unlike the colonies and Parliament before it, is subject to the provision that private property cannot be taken for a public purpose without compensation. This has been expressly asserted in Monongahela Navigation Co. vs. U. S., 148 U. S., 312, where it was said that Congressional control over this subject was no greater than its power to establish postoffices and postroads, and that when acting in relation to either subject Congress was limited by the provisions of the Fifth Article of the Constitution.

Not only is it true that Congress in its control of navigable waters has only that power which was originally possessed by the States, qualified as pointed out above, but so long as Congress does not choose to act in relation to this subject, the individual States may still exercise the same power to the same extent and subject to the same limitations as are imposed upon its exercise by Congress. This power being the same whether exercised by Congress or by the States, it will be important to ascertain what limitations upon it the courts have held to exist when exercised by the States. The cases are numerous which hold, first, that property rights cannot be destroyed without compensation, and, second, that the right of access is a valuable property right which cannot

be destroyed or abridged except upon payment of compensation to the owner.[10]

The Supreme Court of Michigan passed upon the question in Maxwell vs. Bay City Bridge Co., 46 Mich., 278. The plaintiff there was the owner of riparian property upon the Saginaw River, across which a bridge was constructed by the municipality under authority from the State. The structure was placed, not in front of plaintiff's property, but at a very short distance from it, so that a pier for the draw or swinging portion of the bridge extended opposite his wharf and at such a short distance as to make access thereto difficult. The same case was previously in the same court, and is reported in 41 Michi-

(10) *England.* Lyon vs. Fishmongers' Co., L. R., 1 App., 662, 46 L. J., Ch. 68, 35 L. T., N. S., 569, 25 W. R., 65; Little vs. Dublin, Etc., Ry. Co., 7 L. R., C. L. 82; Reg. vs. Ry. Co., 2 Eng. Ry. & C. Cas., 1.

California. Shirley vs. Bishop, 67 Cal., 543.

Connecticut. State vs. Sargent, 45 Conn., 358.

Illinois. Chicago vs. Laflin, 49 Ill., 172.

Iowa. Musser vs. Hershey, 42 Iowa, 356; Grant vs. Davenport, 18 Ia., 179; Renwick vs. Davenport R. Co., 49 Ia., 664.

Maryland. Garrite vs. Balto, 53 Md., 422; Balto, Etc., R. Co., vs. Chase, 43 Md., 23.

Massachusetts. Drury vs. Midland R. Co., 127 Mass., 571.

Minnesota. Carli vs. Stillwater, Etc., 28 Minn., 373; 41 Am. Rep., 290; Union Depot, Etc., Co. vs. Brunswick, 31 Minn., 297; 47 Am. Rep., 789.

Missouri. Myers vs. St. Louis, 82 Mo., 367.

New York. Steers vs. Brooklyn, 101 N. Y., 51; Langdon vs. N. Y., 93 N. Y., 129.

Pennsylvania. Rose vs. Slack, 2 Whart (Pa.), 538; 30 Am. Dec., 278.

Rhode Island. Clark vs. Peckham, 10 R. I., 35; 14 Am. Rep., 654.

Wisconsin. Diedrich vs. S. W. Union R. Co., 42 Wis., 248; 24 Am Rep., 397; Delaplaine vs. Chicago, Etc., R. Co., 42 Wis., 214; 24 Am. Rep., 386; Boorman vs. Sunnuchs, 42 Wis., 233.

gan, 453, where the location of the bridge and the riparian property is well shown in a diagram. No damages were claimed for the occupation of the bed of the stream, but for the interference with the right of access. It was held by that Court that although the bridge was properly there by the authority of the State, the plaintiff was nevertheless entitled to recover for the injury resulting from the abridgment of the right of access. The Court say: "Neither the Supervisors nor the State can directly or indirectly appropriate plaintiff's use of the shore to public uses without compensation; and if even a lawful bridge and pier is constructed so near it as to preclude its profitable use he is entitled to compensation. If the bridge and pier is far enough from the dock so that it may be used but only with inconvenience, the same principle applies, and the question is merely of the extent of the injury."

It will be noted that in this case there was no physical invasion of the property, but merely a permanent interruption of the access to the shore from the stream and *vice versa*.

The question has frequently been raised in reference to the right of access to public streets.

In Indiana vs. Eberle, 110 Ind., 542, 59 Am. Rep., 225, the Court said: "Nothing is better settled in this State than that the owners of lots abutting on a street may have a peculiar and distinct interest in the easement in the street in front of their lots. This interest includes the right to have the street kept open and free from any obstruction which prevents or materially interferes with the ordinary means of ingress or egress from the lots. It is distinguished from the interest of the general public in that it becomes a right appendant and legally adhering to the contiguous grounds, and the improvements thereon, as the owner may have adapted them to the

street. To the extent that the street is a necessary and convenient means of access to the lot, it is as much a valuable property right as the lot itself.

Nor can the streets be invaded so as to inflict special and peculiar damage or injury upon the adjacent lot owner's property, without rendering the wrong-doer liable for such damage. * * * The interest in the street which is peculiar and personal to the abutting lot owner, and which is distinct and different from that of the general public, is the right to have free access over it to his lot and buildings substantially in the manner he would have enjoyed the right in case there had been no interference with the street. The right of access by way of the street is an incident to the ownership of the lot, which cannot be taken away or materially impaired without liability to the owner to the extent of the damage actually incurred."

In Denver vs. Bayer, 7 Colo., 113, the Court said: "No good reason is observed for discriminating against the easement in a street connected with the lot of an abutting owner. We are disposed to say that it is property within the meaning of our Constitution, and any interference therewith which results in injury to the realty must, with the exceptions hereinafter stated, be justly compensated; if in such a case there is no technical 'taking' of private property, there is a damaging thereof within the constitutional inhibition. Whatever permanently prevents the adjacent owner's free use of the street for ingress or egress to or from his lot, and whatever interference with the street permanently diminishes the value of his premises, is as much a damage to his private property as though some direct physical injury were inflicted thereon."

III.

The doctrine that the right of access may be temporarily interrupted for the purpose of repairing or improving the highway is not inconsistent with the doctrine so generally laid down that the destruction of this right entitles the owner to damages. If it is the duty of the government to maintain the highway, it must be also its right to repair and improve it. If the highway cannot be repaired without excluding all persons from traveling upon it, the adjoining owner may also be excluded in the manner and to the extent reasonably necessary. If it is necessary to close the highway entirely, this does not entitle the adjoining owner, who by reason of his location suffers greater inconvenience than a neighbor whose land is at some distance from the obstruction, provided the highway is closed no longer than is reasonably necessary to complete the repairs or the improvement. The closing of the highway is presumably for the purpose of improving it and if one in the immediate neighborhood of the obstruction suffers greater inconvenience than others, he will correspondingly receive greater benefits when the highway is opened again in its improved state. The government would not be authorized, however, in closing the highway permanently, thereby depriving the adjoining owner of ingress and egress for all time.

The case of Northern Transportation Co. vs. Chicago, 99 U. S., 635, was a case where there was a temporary interference with the right of access, made necessary by the construction of certain improvements in LaSalle street in Chicago. It was said in that case that since it was the duty of the city authorities to care for and repair highways, the State must be deemed to have an easement to

repair and improve the street over its entire length and breadth, to adapt it to easy and safe passage. So long as the improvements were made with due care and skill no damages would be allowed. As was said in that case: "No entry was made upon plaintiff's lot. All that was done was to render for a time its use more inconvenient. * * * It is insisted, however," the opinion continues, "that the plaintiffs may recover for the obstruction of the access to their lot, caused by the coffer dam in the river. It is admitted that the dam was necessary to enable the city to construct the tunnel under the river; and it is not complained that it is unskillfully built, or that it was kept in the stream longer than the necessities of the work required. * * * In this case the coffer dam was only a temporary obstruction. It was no physical encroachment upon the plaintiff's property, and it was maintained only so long as it was needed for the public improvement. We cannot doubt that it was lawfully placed where it was, and having thus been, that the city is not responsible in damages for having erected and maintained it while discharging the duty imposed by the Legislature, the obstruction not having been permanent or unreasonably prolonged."

From this decision it is evident that damages were denied because, first, the obstruction did not constitute a physical invasion of plaintiff's lot; and, second, it was not unreasonably prolonged. It follows as a logical consequence from this reasoning that if the obstruction had been upon the land itself, or, not being upon the land, if it had been permanent in character instead of being temporary and not unreasonably prolonged, damages would have been allowed.

The doctrine then would be that without a physical invasion, no damages can be recovered for consequential injuries to property unless the obstruction is maintained

an unreasonable length of time. As soon, however, as the obstruction is maintained an unreasonable time it becomes *quo ad hoc* permanent in character and therefore unlawful. In the case under consideration, Transportation Co. vs. Chicago, damages were denied, not on the ground that the injuries were consequential, but because the interference was temporary. Had the obstruction been permanent the injury would have been no less consequential, and yet the plaintiff would have been entitled to recover. Whatever rights the adjacent owner has in the street whether he has them by virtue of his ownership of abutting property or simply from the fact of his being a member of the public, are subject to temporary interruption on the part of the public by the exercising of the easement to repair and improve the highway. This easement of the public authorities, however, is again limited by the requirement that those rights must not be interrupted for a longer time nor to a greater extent than the necessities of the case require.

The doctrine that an obstruction in a highway necessary for repairs or improvements, which does not encroach upon an adjoining owner's land and which is not maintained longer than is reasonably necessary, is not a nuisance, was recognized at the common law. It was discussed in Wilkes vs. Hungerford Market Co., 2 Bingham, 281, decided in 1835. There the plaintiff was allowed to recover damages for an injury to his business caused by the maintenance of an obstruction in a highway for an unreasonable length of time. The plaintiff in this case was a bookseller on a highway, whose damage consisted in the loss of custom by the interruption of his patrons' access to his shop.

This case distinguishes clearly between the injury to the right of passing and repassing upon the street, on the

one hand, and the injury suffered by an adjacent owner whose access to his property is cut off or destroyed. The plaintiff in that case did not ask damages for being prevented from passing and repassing upon the highway in the usual manner, which was an injury suffered by him in common with all others, but for the interruption of the access to his land. Tyndal, C. J., held that even this right may be interrupted when necessary for the repair or improvement of the highway, provided the interruption is not continued an unreasonable length of time; but for an interruption which is continued for a time longer than was required by the necessities of the case, an action would lie. This is an injury suffered in addition to that which is suffered by the public at large. "The injury to the subjects in general, is that they cannot walk in the same track as before; and for that alone an action on the case would not lie; but the injury to the plaintiff is the loss of a trade, which, but for this obstruction to the general right of way, he would have enjoyed; and the law has said from the Year Books downwards that if a party has sustained any peculiar injury, beyond that which affects the public at large, an action will lie for redress." "The plaintiff, in addition to a right of way which he enjoyed in common with others, had a shop on the road side, the business of which was supported by those who passed; all who passed had the right of way; but all had not shops." Bosanquet, J., said: "The injury of which the plaintiff complains is, injury to his business as a shopkeeper; he does not complain of being stopped in passing and repassing as others have been stopped; but that by the obstruction in question persons who frequented his shop have been prevented from approach. * * * For the mere act of obstruction in passing and repassing the plaintiff could not have sued, nor could his tenants them-

selves as mere occupiers; but the foundation of the action was, though it rested on an obstruction to passing and repassing, the injury occasioned to the plaintiff by the deterioration of his property."

That case discusses also some of the prior decisions of the English courts, and the result there arrived at is in harmony with the more recent decisions cited in our main brief, in which the right of access to navigable water is held to be a valuable property right, which its owner possesses in addition to his right to pass and repass upon the stream after getting upon it in common with other members of the public, and a right of which he cannot be deprived without compensation.

This doctrine that the right of access is subject to temporary interruption to the extent and for the time reasonably necessary for repairs or improvements illustrates what was said in the English case of Lyon vs. Fishmongers' Company, elsewhere referred to, that the right of access is controlled but not extinguished by the public right of navigation.

The easement to repair or improve the highway can never serve as a justification for the permanent destruction of the right of access or for even a temporary interference with it to any extent not required by the necessities of the case.

IV.

We have endeavored to show that the right of access, constituting as it does, a part of the upland, cannot be appropriated without compensation. Even though this were not true, any interference on the part of Congress,

not reasonably necessary for the accomplishment of a lawful purpose, would still be unlawful.

There is another aspect of the present case which it is unnecessary to discuss, provided our argument so far is conceded to be sound. But granting, solely for the purpose of the argument, that Congress could erect the pier in question and permanently interfere with plaintiff's access, it could do so to no greater extent than the purpose for which the pier was erected and which is relied upon as a justification, required.

It appears that the pier constructed by the Government across the front of plaintiff's land is permanent in character, and extends several feet above the surface of the water; that it is about fifty feet in width, and completely destroys plaintiff's access to the navigable part of the stream except by passing over it or over the submerged land of his neighbors. The construction of the pier itself does not work the legal injury and ouster of which the plaintiff complains; but it is the assertion by the defendant that the Government in constructing the pier, and deepening the water to the northward thereof, thus widening the naturally deep channel of the stream, acquired the right to exclude the plaintiff from approaching the pier on either side thereof, and going across it for the purpose of enjoying his right of access to and from his land. By the dredging, the area of navigable water in front of plaintiff's land was largely increased, and the part dredged, became a part of the navigable channel. The record discloses an absolute refusal on the part of the defendant to permit plaintiff to cross this pier in the exercise of his right of access and an assertion by the defendant of the absolute use and possession thereof for all purposes. This marks the distinction which clearly exists between the case at bar and any of the former decisions of this Court. A statement

of my understanding of the law applicable to this point, will make clear our position.

First. Conceding for the purposes of the argument that the riparian owner's title to the submerged land is qualified by and subject to the public right of navigation, and to the interference with the exclusive occupation thereof by him, by the exercise of the powers of the general Government to improve the navigability of the stream for the purposes of commerce and navigation, still that does not furnish a defense in this case. The right of access owned by the plaintiff as pointed out in the main brief does not spring from the plaintiff's ownership of the submerged soil, but is appurtenant to, and is a form of enjoyment of the upland, wholly independent of the general right of navigation which the owner has, as one of the general public. The extent to which this right of access is qualified by the right of navigation is stated by the Lord Chancellor in Lyons vs. Fishmongers Company, as follows: "I cannot entertain any doubt that the riparian owner on a navigable river in addition to the right connected with navigation to which he is entitled as one of the public, retains his rights of access as an ordinary riparian owner, underlying and controlled by, but not extinguished by the public right of navigation."

Second. Applying the doctrine just stated to the case at bar, I reach this conclusion, namely: Even granting that the Government had the lawful right to construct the pier in question, and deepen the stream and widen the navigable part thereof by dredging, as a part of the improvement, and to maintain the same for the public purposes stated, and in the construction and maintenance of the pier to interfere with the plaintiff's right of access to navigable waters, it could do so only to such an extent as was reasonably necessary for the purposes

of trade and commerce and navigation, and no further; that it is a necessary qualification and limitation to the right of the Government to interfere with the enjoyment by the owner of his riparian rights without making him compensation, that they shall only do so to the extent necessary for the enjoyment of the easement asserted by the government for the public use of commerce and navigation. The defendant had no right to prevent the plaintiff from crossing the pier in question, or to use it from time to time in connection with his upland, provided such crossing and such use did not unreasonably interfere with the public right of navigation and the legitimate use of the pier for trade and commerce. It could hardly be pretended, and never has been claimed, that the plaintiff might not make use of the pier by crossing it from time to time, or by transporting a cargo across it to his own land, if such use did not interfere with the navigation by the public of the deep water which lies between the pier in question and the non-navigable water to the northward of it. The plaintiff would have a right to construct a wharf from his upland to the south side of the pier in question, and use it in connection with his land, and in connection therewith use the pier in front of his wharf for the purpose of mooring his vessels, or of loading, or unloading the cargoes thereof, to the full extent that it did not interfere with the public right of navigation. The fact that the pier has been placed there by the government as an artificial border to the navigable channel, cannot be held to destroy the right to land as it exists at common law, and can only be held to qualify or limit that right of landing to the extent that such use might interfere with the public right of navigation, trade and commerce.

If such use of the pier, or the mooring of vessels thereat, did not interfere with the public right of navigation, it would seem a most extraordinary thing that the govern-

ment would be permitted to arbitrarily refuse to plaintiff the enjoyment of his right of access, because in so doing he would have to cross the pier.

This view of the law was accepted by the Circuit Court for the District of Maryland, in the Edmondson Island case, 42 F. R., 15. The United States Government had constructed a lighthouse on the submerged land, having obtained the title in fee from the owner of the piece of land on which the lighthouse was constructed. The government had also obtained a lease for a term of years for a portion of the island for the use of the Fish Commission, and had, by artificial construction, extended the piece so leased out into the water. As a part of the construction certain cribbing and filling in was done, which served the double purpose of protecting the premises of the Fish Commission and the lighthouse proper from injury from the floating ice in the Susquehanna river. Such cribbing was, in fact, necessary for those purposes. After the expiration of the lease the government removed the Fish Commission buildings onto the artificially made extension, claiming that it became government property, and that it had a right to the exclusive occupation thereof, including the cribbing. In an action of ejectment brought by the owner of the island to obtain possession of the addition, the government defended upon the ground that the construction of the cribbing was done in the exercise of the power of the government under the Interstate Commerce Clause for the improvement of the navigable channel, and for the purposes of trade and commerce; and it was contended that such cribbing and structure being necessary for the protection of the lighthouse and for the purposes of improving the navigation of the stream, and in furtherance of trade and commerce, the United States was entitled to the exclusive enjoyment thereof, and that the owner of the land did not have the

right to cross the same from his land to the water for the ordinary lawful purposes. With reference thereto, the Court says as follows:

"But these structures, although built under the direction of the engineers in charge of the improvement of the navigable channels of the Chesapeake, and of the officials in charge of the maintenance of the lighthouse, were constructed primarily to facilitate the purposes of the Fish Commission, and so far as they are now used, in the sense of being occupied and held in exclusive possession, they are used solely by the Fish Commission. The houses removed from the other portions of the island at the termination of the lease, and re-erected on this new-made area, have no use whatever in connection with the lighthouse, or with commerce and navigation. It was held by this court in the Hawkins Point Light House Case, 39 Fed. Rep., 77, that the United States might erect a necessary lighthouse in a navigable stream in front of the land of a riparian proprietor who had not only the rights which the Maryland law of 1862 had given him as a riparian proprietor, but had also a patent from the State for the submerged land itself, without making him any compensation. *But it is a necessary qualification of that rule that the United States can exclude the owner without making him compensation to no greater extent than is reasonably necessary for the maintenance of the lighthouse; and that the United States would have no right to forbid such an owner from making any use of the premises which did not interfere with the easement asserted by it for the public use of commerce and navigation.*

"If, for example, the riparian owner had, under the State law, an exclusive right to plant and take oysters in the waters surrounding the lighthouse, he could do so, unless it was injurious to the lighthouse structure, or interfered with navigation; but the United States could not

exclude him from that privilege upon the ground that it interfered with the lighthouse or navigation and grant the same privilege to the Fish Commission. So in this case, if these structures are such that, if made by any private person, they would become appurtenant to the island and belong to the owner of it, if the United States justifies the construction of them on the ground that they are aids to commerce and navigation, it can only exclude the owner of the island from them to the extent required by the use which is relied upon as the justification of their construction. After erecting the lighthouse upon the parcel 45 feet square, to which the United States acquired title by deed, it might have discovered that the safety of the lighthouse required that a heavy wall should be built out in the water so as to surround the island. If such a wall had been built, could it be contended that the United States might say to the owner of the land, 'You must not make any use of the wall for landing or drawing seines, because it is injurious to the structure,' and then proceed to grant that privilege to the Fish Commission."

The doctrine is well stated in this case in that part of the decision where it is said:

"If the United States justifies the construction of them (the structures) on the ground that they are aids to commerce and navigation, it can only exclude the owner of the island from them to the extent required by the use which is relied upon as the justification of their construction."

In that case the government could not have justified the erection of the structures on the ground that they were necessary for the use of the Fish Commission; and it appearing that they might be used by the Fish Commission while serving the purpose for which alone they could have been lawfully placed there, the government could not exclude the owner of the island from using them for the

same purpose, or for any purpose or in any manner which did not interfere with that use by the government which justified their construction, that is, the improvement of commerce and navigation.

The same doctrine is laid down in Hawkin's Point Light House, 39 Fed. Rep., 77, where it was held that the government can exclude the owner of the submerged land without compensation to no greater extent than is reasonably necessary for the purpose which justifies his exclusion at all; and that the owner might make any use of the premises which does not interfere with the easement asserted by the government for the purpose of regulating commerce and navigation. If this is true with regard to the exculsion of the riparian owner from the submerged land, which it is conceded may be occupied by Congress for purposes of commerce, without compensating the owner, it would for stronger reasons apply to the exclusion from the valuable property right of access.

V.

The principle that property rights shall not be disturbed to any greater extent than the necessities of the case require is well recognized, even where property is taken under the power of eminent domain and full compensation made to the owner.

The limitation upon the power to take private property for public use under the power of eminent domain is stated by Cooley, in his Constitutional Limitations, 6th Ed., pp. 664-5, as follows:

"The taking of property must always be limited to the necessity of the case, and consequently no more can be appropriated in any instance than the proper tribunal shall adjudge to be needed for the particular use for which

the appropriation is made. When a part only of a man's premises is needed by the public, the necessity for the appropriation of that part will not justify the taking of the whole, even though conpensation be made therefor. The moment the appropriation goes beyond the necessity of the case, it ceases to be justified on the principles which underlie the right of eminent domain."

If the appropriation of private property to an extent not required by the necessities of the occasion cannot be justified, even where what is taken is paid for, it requires little reflection to perceive how much more this would be true where no compensation is made at all.

If the use of the pier in question by the plaintiff does not interfere with the purpose for which it was erected, viz: the improvement of navigation, it is not apparent what warrant or authority there could be for refusing him the right to cross it for the purpose of reaching his land. It could not be justified on the ground that it was necessary to protect the artificial channel, because it nowhere appears it was necessary or that the pier would not serve that purpose if plaintiff were permitted to cross.

Where an officer of the Federal Government is sued in ejectment and seeks to justify under an authority from the United States, he must show that his authority extends that far. If the agents of the government build a pier and exclude the riparian owner from crossing it, on the ground that it was necessary for the improvement of commerce and navigation, they must show that it was necessary. It appears nowhere in the record that the crossing of the pier by the plaintiff interfered with the purpose for which it was erected. On the contrary, it appears otherwise. The pier is placed at one edge of the channel, leaving a broad expanse of navigable water between it and the opposite pier.

If this view of the law is correct, and it is true that

plaintiff is entitled to cross the pier for the purpose of reaching navigable water provided his doing so does not interfere with that use by the government which justifies its construction, then whether or not its use by the plaintiff would interfere with the navigation of the stream at this point, would be a question of fact to be determined by a jury, and it would be error for a Court to determine this question adversely to the plaintiff as a matter of law.

We think that the plaintiff was at least entitled to have this question determined by a jury sworn to investigate the facts; and in case it was found that this use of the pier by plaintiff was not an unreasonable interference with the purpose for which the pier was constructed, i. e., the improvement of navigation, he was certainly entitled to the enjoyment of it.

VI.

The action of ejectment is the proper remedy for the enforcement of the right of access and to prevent the interruption or destruction thereof. This was the form of action in the Edmondson Island Case, 42 Fed. Rep., 15, discussed above.

It was there held that the title to the locus in quo was in the riparian owner subject to certain easements on the part of the Government. So long as the Government kept within the limits of the authority under which it might occupy the submerged soil, its possession was lawful. As soon, however, as the Government exceeded those limits, its possession was wrongful and the riparian owner was entitled to proceed in ejectment. In that case the exclusive use of the government structures for

the purposes of the Fish Commission was held to be without justification and although the structures were originally built for a lawful purpose, the plaintiff was held to have rightly brought his action in ejectment.

To the same effect are Adams vs. Emerson, 6 Pick., 57; Robbins vs. Borman, 1 Pick., 122; Perley vs. Chandler, 6 Mass., 454.

In the case at bar the occupation of plaintiff's submerged land for the purpose of excluding him from the enjoyment of his riparian right of access to any extent not necessary for the purpose of improving the navigability of the stream would make the occupation unlawful and render the defendant liable to a suit in ejectment.

If plaintiff's right of access can be utterly destroyed in any case without compensation, even where necessary for the improvement of trade and commerce, a proposition which appears to have been negatived repeatedly by our courts, we urge that this Court ought not to hold that it may be so destroyed where no necessity is shown to exist.

Respectfully submitted,

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